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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, *Petitioner,*

v.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANTZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED; BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS OF THE ESTATE OF BEN WILLIAMSON, DECEASED; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS OF THE ESTATE OF JAMES H. KITCHEN, DECEASED; CATHERINE C. KITCHEN, EXECUTRIX OF THE ESTATE OF JOHN W. KITCHEN, DECEASED; HENRY SANDIFER, EXECUTOR OF THE ESTATE OF ALEXANDER B. MASSEY, DECEASED, *Respondents.*

BRIEF FOR RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC.

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BRIEF FOR RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC.

This litigation involves the construction of Rules 6 (b) and 25 (a), Federal Rules of Civil Procedure, and presents for decision the following questions:

First, whether or not a power to extend the right of revivor beyond the prescribed period of limitation may be imported into Rule 25, via Rule 6 (b)?

Second, if the above inquiry be answered in the affirmative, is the result of such construction a violation of the prohibition contained in *Sec. 723 (b), Title 28 U. S. C. A.*, reading, "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant," in view of the two year period of limitation upon the right of revivor prescribed by *Sec. 778, Title 28, U. S. C. A.?*

ARGUMENT

THE TWO YEAR PERIOD OF LIMITATION PRESCRIBED IN RULE 25 (a) MAY NOT BE ENLARGED.

The opinion herein of the Sixth Circuit Court of Appeals *(153 Fed. (2) 685)*, and of the District Court in *Anderson v. Brady, 1 F. R. D. 589*, fully and clearly set out the reasoning upon which is based the contentions of respondents that the following language of *Rule 25 (a) (1), Federal Rules of Civil Procedure*, is a mandatory restriction upon the exercise of discretion to extend the time for revivor beyond the two year limitation:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

Consequently, we content ourselves with the following summarization:

First: Rule 25 (a) (1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. That it was the

purpose of the rule to prescribe a period of limitation upon the right of revivor is apparent from the fact that the rule was derived from *Sec. 778, 28 U.S.C.A.*, which fixed the same period of limitation as that contained in the rule. That the statutory provision was a statute of limitation is obvious, and the rule manifests no purpose to change, modify, or extend, the statutory period, but on the contrary, expressly commands the court to dismiss the action if revivor is not had within the period prescribed by the rule and statute.

Second: Where the time within which revivor may be had is absolutely fixed by statute, the failure to revive within the prescribed time is fatal, and "excusable neglect" is no more effective to avoid the bar of a definite limitation than is a failure to bring an original action within the time limit fixed by statute.

There is no ambiguity in the language of Rule 25 (a) (1). It provides that substitution may be made within two years after death, and then directs that "if substitution is not so made, the action shall be dismissed as to the deceased party." The meaning of such language is plain and unmistakable. See *Whelan v. Welch (App. D. C.) 269 Fed. 689, 692; 1 C. J., pages 240, 241, Sec. 520; 1 C. J. S., pages 230, 231, Sec. 179.*

Third: The definite mandatory limitation contained in both the statute (Sec. 778) and the rule (Rule 25 (a) (1), may not be broadened by the importation of an exception via Rule 6 (b). The words of limitation in the rule must have been used advisedly, since they are derived from the statute in force at the time of the adoption of the rule. The general language of Rule 6 (b) must, under the established rule of construction, give way to the particular and specific language of Rule 25 (a) (1), for otherwise the plain meaning and intent of the latter rule would be de-

feated. In answer to a similar attempt to broaden the specific limitation contained in Rule 73 (g), it was said in *Burke v. Canfield (App. D. C.) 111 Fed. (2) 526:*

> "It has been said that Rule 6 (b) permits an extension to be granted even after expiration of the 40 days. Ainsworth v. Gill Glass & Fixture Co., 3 Cir., 104 F. 2d 83. But if the broad language of the latter rule applies, then the language of Rule 73 (g) quoted above is superfluous. The words of limitation must have been used advisedly, and it is an established rule that general language yields to the particular, where both apply to the case at hand and the plain intent is not defeated by such a construction. Bailey v. Allen E. Walker, 55 App. D. C. 74, 2 F. 2d 123. Rule 6 (b), therefore, has no application to extensions of time for the filing of the record and docketing of the case on appeal, since the subject is dealt with specifically in Rule 73 (g)."

And in *Wallace v. United States (C.C.A. 2) 142 Fed. (2) 240,* (cer. den. *323 U. S. 712),* it was sought to broaden the 6 months limitation of Rule 60 (b) upon the right of a party to obtain relief from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, by the argument that Rule 6 (b) permitted such enlargement notwithstanding the specific limitation of Rule 60 (b). In denying such argument, it was said:

> "The terms of Rule 60 (b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6 (b)."

The prohibition of Rule 60 (b) "in no case exceeding six months," is no more emphatic and specific than the mandatory direction of Rule 25 (a) (1) that "the action shall be dismissed as to the deceased party" if substitution is not made within the two year period.

Fourth: Petitioner seeks to avoid the mandatory direction of Rule 25 (a) (1) by the argument that the word "shall," though mandatory in character, should in this instance be construed as permissive. But the word "shall" in a statute is normally "the language of command." *Escoe v. Herbst, 295 U. S. 490, 79 L. Ed. 1566; Exparte Jordan, 94 U. S. 248, 24 L. Ed. 123; Brown v. Hecht Co. (App. D. C.) 137 Fed. (2) 689.* And where, as in Rule 25 (a) (1), there is the use of both "may" and "shall" in the same paragraph, the necessary implication is that each word is used in its ordinary sense and not in the ordinary sense of the other. In the opening sentence the word "may" and in the following sentence the word "shall" is used, indicating permission in one and command in the other. *United States v. Thoman, 156 U. S. 353, 39 L. Ed. 450; Brown v. Hecht Co.*, supra; *Ballou v. Kemp (App. D. C.) 92 Fed. (2) 556; Smith v. School Dist. 241 Mich. 366, 217 N. W. 15; 50 Am. Jur. p. 51, Sec. 30; 25 R. C. L. pp. 767-769, Sec. 15.* And especially is the word "shall" to be regarded as peremptory where, as in Rule 25 (a) (1), a right or benefit to anyone depends upon giving it an imperative construction. *West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71; United States v. Flynn (D. C. N. Y.), 11 Fed. (2) 899; Lewis' Sutherland Statutory Construction (2nd Ed) p. 1155.*

Fifth: It is also argued by petitioner that since Rule 6 (b) expressly excludes from its operation, (a) the period for taking any action under Rule 59 concerning new trials, and, (b), the period for taking an appeal, it follows that the specification of these two exceptions excludes the "engrafting" of an additional exception upon the rule. Such argument finds its answer in the response of the 2nd Circuit to a similar argument in *Wallace v. United States*, supra, as follows:

> "Wallace argues that Rule 6 (b) permits the court, for cause shown, to extend that six

months' period; he urges that, as that Rule explicitly excepts from its scope only Rule 59 and the period for taking an appeal, it must apply to motions made pursuant to Rule 60 (b). We can not agree. Interpretative devices such as expressio unius exclusio alterius have diminished importance today; they must yield to more obvious indications of intention. The terms of Rule 60 (b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6 (b)."

See also, *Securities & Exch. Com. v. Joiner Leasing Corp. 320 U. S. 344, 88 L. Ed. 88.*

Sixth: Finally, a careful reading of Rule 6 (b) negatives any idea that it was intended that the rule should apply to, or limit, the mandatory direction in Rule 25 (a) that "the action shall be dismissed as to the deceased party" in the event of a failure to revive the action within the two year period. Rule 6 (b) relates to acts required or allowed to be done *by a party* to the action, and affords relief *to a party* for his failure to take timely required steps. But this rule has no application to action required or demanded *of the court.* So, if Rule 25 (a) had merely provided for the steps to be taken by a party within the two year period in order to obtain a revivor of the action, it might be argued with more force that under the provisions of Rule 6 (b) the time for taking such Steps might be enlarged for "excusable neglect." But Rule 25 (a) further directs the dismissal of the action in the event of a failure to revive within the prescribed period; this is a direction of the action to be taken *by the court*, not *by a party*, and hence Rule 6 (b) is without application. The excuse of "excusable neglect" can have no bearing upon, or reference to, required judicial action.

THE PERIOD OF LIMITATION FOR REVIVOR PRESCRIBED IN SECTION 778, 28 U. S. C. A. MAY NOT BE ENLARGED OR RESTRICTED BY THE RULES OF CIVIL PROCEDURE

The authority for the Federal Rules of Civil Procedure is found in *Sec. 723 b, 28 U. S. C. A.*, which expressly provides that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Section 778, 28 U. S. C. A., in the first paragraph, provides for the revivor by or against the personal representative of a deceased party, of any cause of action which survives by law; the second paragraph prescribes the limitation upon such right of revivor or substitution as follows:

> "* * * such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to executors and administrators appointed in any State or Territory of the United States."

Since all personal actions abate upon death at common law, the right of revivor is purely of statutory origin, and Section 778 both creates such right of revivor or substitution, and prescribes the limitation upon the right so created. Consequently, the language above quoted is not merely a limitation of the remedy, but a limitation of the right. In its entirety, Section 778 is a statute of creation, and the assertion of the right of substitution or revivor within the time specified is an indispensable condition since the time element is an inherent element of the right created by the statute, and the limitation of the remedy is a limitation of the right. The statute is an offer of the right of revivor or substitution on condition that it be exercised within the specified time, and if not so exercised

the right no longer exists. *34 Am. Jur. p. 16, Sec. 7; 37 C. J. p. 686, Sec. 5,* and *p. 732, Sec. 51; United States, etc. v. McCord, 233 U. S. 157, 162, 58 L. Ed. 893; United States v. Wardwell, 172 U. S. 48, 43 L. Ed. 360; Finn v. United States, 123 U. S. 227, 31 L. Ed. 128; Walsh v. Mayor, 111 U. S. 31, 28 L. Ed. 338; Partee v. St. Louis & S. F. R. Co. (C. C. A. 8), 204 Fed. 970; Boston & M. R. Co. v. Hurd (C. C. A. 1) 108 Fed. 116; United States F. & G. Co. v. Tafel Elec. Co. 262 Ky. 792, 91 S. W. (2) 42; Crandall v. Irwin, 139 Ohio St. 253, 463, 39 N. E. (2) 608; 40 N. E. (2) 933, 139 A. L. R. 895; Smith v. Toman, 368 Ill. 414, 14 N. E. (2) 478, 118 A. L. R. 924.* In the last cited case it is said:

> "* * * this court has given consistent recognition to the principle that where the statute creates a right that did not exist at common law and restricts the time within which the right may be availed of, or otherwise imposes conditions, such statute is not a statute of limitation but the time element is an integral part of the enactment. * * * Statutes of limitation relate to the question of remedy by fixing a time within which a suit must be brought. Those statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitation."

We have no intention of burdening the Court with any dissertation upon what is "substantive," or "procedural," or "remedial." As was said by Judge Lowell in *Dexter v. Edmands, 89 Fed. 467,* "The distinction between remedy and substantive right is incapable of exact definition; indeed the difference is somewhat a question of degree,"—a statement that finds confirmation in *Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. Ed. 2079.* That the right of revivor or substitution created by *Sec. 778, 28 U. S. C. A.,* is a substantive right may not be seriously questioned; and

since the limitation upon such right, contained in the same statute, is a limitation upon the right itself, and, therefore, an integral part of the right, it follows that such limitation may not be abridged, enlarged, or modified by the Federal Rules of Civil Procedure. See *Pritchard v. Norton, 106 U. S. 124, 130, 27 L. Ed. 104.*

Directly in point is the decision of the Supreme Court of Tennessee in *Adcox v. Southern Ry. Co., 184 S. W. (2) 37, 156 A. L. R. 1091*, wherein it was held that the right under a Tennessee statute to bring a new suit in the state courts within one year following a judgment of dismissal without a trial on the merits, is a substantive right within the provisions of *Sec. 723, 28 U. S. C. A.*, and may not be abridged, enlarged, or modified by the Federal Rules of Civil Procedure. The court said:

> "We think the right to bring a new suit within one year, following a judgment of dismissal without a trial on the merits, is a substantive right."

It should also be pointed out that the limitation prescribed by Sec. 778 is a limitation upon the jurisdiction of the courts, and, consequently, may not be enlarged. *United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058.*

It is respectfully submitted that the decision of the court below should be affirmed.

LeWRIGHT BROWNING
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Ben Williamson, Jr. and Davis Geiger, Co-Executors, etc., Watt M. Prichard and Charles V. Kitchen, Co-Executors, etc., and Catherine C. Kitchen, Executrix, etc.